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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY, *Petitioner,*

v.

L. F. COLE, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Railway Labor Conference respectfully moves for leave to file the attached brief *amicus curiae*. Requests for consent by the parties to the filing of the brief were granted by petitioner but refused by respondent.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees, and in regard to other labor-management relations problems that are of concern to the railroads generally. As is set forth more fully in the attached brief, the decision

by the court below interprets Section 3 First (j) of the Railway Labor Act (45 U.S.C. § 153 First (j)) in a manner which threatens to undermine the finality of arbitration awards disposing of the claims and grievances of railroads employees, and which we believe to be contrary to the Railway Labor Act and to prior decisions by this Court and by other courts of appeals. That decision, therefore, is of great importance to the Conference and to each of its member railroads.

The purpose of the attached *amicus* brief is to explain the importance of the decision below to the railroad industry generally and to set forth additional or fuller reasons, as compared to the petition, as to why the decision below is erroneous and should be reviewed by this Court. Hence, the attached brief is believed to be necessary to an adequate presentation of the position of the National Railway Labor Conference and its member railroads and to be relevant to the disposition by this Court of the petition for writ of certiorari.

Respectfully submitted,

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Railway Labor Conference as *amicus curiae* submits this brief in support of the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Cole* v. *Erie Lackawanna Railway Company,* 541 F.2d 528 (1976).

STATEMENT OF THE CASE AND OF THE INTEREST OF AMICUS CURIAE

1. The Railway Labor Act.

The Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*) governs labor-management relations in the railroad and airline industries.[1] The Act was amended in 1934 (48 Stat. 1189) to provide, in § 3 First, a procedure for the adjustment of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions . . . ." 45 U.S.C. § 153 First (i). Such claims and grievances "shall be handled in the usual manner up to and including the chief operating officers of the carrier designated to handle such disputes," but if not adjusted through such recourse to the carrier's claims-and-grievances procedure "the disputes may be referred by petition of the parties or by either party to the appropriate division of" the National Railroad Adjustment Board (the "NRAB"). *Ibid.*

Each of the four divisions of the NRAB is comprised of an equal number of members selected and compensated by the rail carriers and by the national unions representing their employees. 45 U.S.C. § 153 First (a)-(h). In the event of a deadlock or if for some other reasons a majority of those members cannot agree upon an award disposing of a dispute, a "neutral person" is selected (and compensated) by the National Mediation Board (the "NMB") to "sit with

[1] Air carriers are excepted from the application of § 3 of the Act. 45 U.S.C. § 181. Disputes over claims and grievances in that industry are governed by § 204. 45 U.S.C. § 184.

the division as a member thereof and make an award." 45 U.S.C. § 153 First (l). All awards "shall be final and binding upon both parties to the dispute," 45 U.S.C. § 153 First (m), subject only to judicial review "for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order," 45 U.S.C. § 153 First (p) and (q).[2]

Section 3 Second of the Act, as enacted in 1934, authorizes the rail carriers and their employees, "acting through their representatives," to establish "system, group, or regional boards of adjustment for adjusting and deciding disputes of the character specified in" § 3 First in lieu of the NRAB. 45 U.S.C. § 153 Second (first paragraph). Establishment of special boards of adjustment pursuant to that paragraph is dependent upon voluntary agreement between the carriers and unions, but in 1966 the Congress amended § 3 Second (80 Stat. 208) to add a second paragraph under which "the establishment of a special board of adjustment to resolve disputes otherwise referrable to the" NRAB is mandatory if either a carrier or "the representative of any craft or class of employees" requests the other to join in establishing such a board. The carrier and the union each designates and compensates a member of the board and a "neutral member" is designated and compensated by the NMB to decide disputes as to which the carrier and union mem-

[2] The provisions for judicial review are quoted as revised by a 1966 amendment (80 Stat. 208). For the situation in regard to judicial review prior to that amendment, see, *e.g.*, *Gunther* v. *San Diego & A.E. R. Co.*, 382 U.S. 257 (1965).

bers fail to agree.[3] The awards of such boards "shall be final and binding upon both parties to the dispute," and are subject to judicial review "in the same manner and subject to the same provisions that apply" to review of awards by the NRAB.[4] 45 U.S.C. § 153 Second (second paragraph).

While the NRAB continues to function, most disputes that go to arbitration are now handled by boards established pursuant to § 3 Second. In the fiscal year ended June 30, 1975, for example, the NRAB disposed of 1033 cases, special boards of adjustment established pursuant to the first paragraph of § 3 Second disposed of 1071 cases, and special boards of adjustment established pursuant to the second paragraph of § 3 Second (which are identified by the NMB as "PL" or "Public Law" boards) disposed of 5404 cases.[5]

Section 3 First of the Act also provides, among other things, that "[p]arties may be heard, either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to

[3] If the carrier and union are unable to agree upon "the establishment and jurisdiction of the board," the NMB also appoints a neutral to determine "such matters." Neutral members may be selected by the carrier and union by agreement, but they usually are designated by the NMB.

[4] While the 1966 amendment in terms provides for such review only in proceedings for the "enforcement" of awards, the lower courts (including the court below in this case) generally have held (upon the basis of legislative history) that review can be had also in proceedings to set aside an award. See, *e.g.*, *United Transp. Union* v. *Indiana H.B.R. Co.*, 540 F.2d 861 (7th Cir., 1976).

[5] Forty-first Annual Report of the National Mediation Board (1975), at 43-45.

the employee or employees and the carrier or carriers involved in any disputes submitted to them." 45 U.S.C. §153 First (j). Those provisions of § 3 First (j) afforded the principal basis for this Court's decision, in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945), to the effect that an NRAB "award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by § 3 First (j)" (*id.*, at 738). Having concluded that the union representing the claimants' craft or class was not authorized as a matter of law by the Railway Act "to settle the claims accrued for the past or to represent the claimants exclusively in proceedings before the Board," and thus that "for the union to act in their behalf with conclusive effect, authorization by them over and above any authority given by the statute was essential" (*id.*, at 741), this Court affirmed a decision remanding the case to determine, among other things, whether the claimants had in fact "authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the" proceedings before the NRAB (*id.*, at 748-749).

In so holding this Court recognized that a NRAB award would be binding on an employee claimant, where his union "appeared and purported to act for him," if "in some legally sufficient way he authorized it to act in his behalf" (*id.*, at 738), and the Court explained in a footnote to that statement that "[a]uthority might be conferred in whatever ways would be sufficient according to generally accepted or 'common law' rules for the creation of an agency, as conceivably by specific authorization given orally or in writing to settle each grievance, by general authority given to

settle such grievances as they might arise, or by assenting to such authority by becoming a member of a union and thereby accepting a provision in its constitution or rules authorizing it to make such settlements" (*id.*, n. 38, at 738-739). In short, § 3 First (j) confers "statutory rights" which an employee "may exercise independently or authorize the union to exercise in his behalf" (*id.*, n. 39, at 740).

A petition for rehearing resulted in a further opinion by the Court. *Elgin, J & E. R. Co.* v. *Burley*, 327 U.S. 661 (1946). While stating that it adhered to its prior decision, the Court further emphasized the burden upon an employee to establish that the union was not authorized to represent him in the handling of his claim or grievance (*id.*, at 664-665); the many ways in which the union could be given such authority—even going beyond common-law means to include "usage and custom"—(*id.*, at 663) including, "so far as union members are concerned . . . by appropriate provisions in [the union's] by laws, constitution or other governing regulations" (*id.*, n. 2, at 663-664); and that—even in the absence of such authorization—an employee "having knowledge or notice that . . . proceedings are pending before the" NRAB in regard to his claim could not "stand by" until a decision was reached "and then come in for the first time to assert his individual rights" (*id.* at 666-667).[6]

[6] The carrier's petition for rehearing was supported *amicus curiae* "by various labor organizations and by the office of the solicitor general" (id., n. 1, at 661) who demonstrated, in the words of Mr. Justice Frankfurter, that the prior "decision created havoc in the railroad world" (*id.*, at 674). While Justice Frankfurter (joined by Chief Justice Stone and Mr. Justice Burton) concluded that "the Court's interpretation of its original opinion . . .

Mr. Justice Frankfurter subsequently had occasion to note that the railroad unions "were quick to secure amendment to their constitution or statutes in order to avoid the decision of this Court in" *Burley. Employees* v. *Westinghouse Corp.*, 348 U.S. 437, 458 (1955). Thus, as the record in this case discloses (App. 55-56),[7] the Constitution of the United Transportation Union (the "UTU"), to which respondent Cole belonged, provides that:

> "Every member of the United Transportation Union grants complete authority to the United Transportation Union and any of its constituted representatives to act in said member's behalf for the purpose of disposing, in any manner, of any and all of said member's claims, complaints, or grievances against their employer; and to submit such claims, complaints, or grievances for determination to any person, board, or other tribunal provided by law or otherwise as may be deemed to be necessary. The United Transportation Union shall have authority to receive notice of hearings or to

'adheres' to it by extracting from it almost all of its vitality" and "erects a series of hurdles which will be, and we assume were intended to be, almost impossible for an employee to clear," he continued to dissent to the decision "since litigation is authorized, and hope springs eternal in the litigant's breast" so that the opinion on rehearing did not completely cure the "mischief" which he perceived in the original opinion (*id.*, at 668). This case provides some justification for the concern thus expressed. The Second Circuit has noted that several developments in "federal labor law" since "the *Burley* decisions were announced" have "considerably diminished" the "urgency" of interpreting the Act as "giving the individual employee considerable leeway in pursuing his own grievance . . . ." *Pyzynski* v. *New York Central Railroad Company*, 421 F.2d 854, 861-862 (2d Cir., 1970).

[7] Citations herein to "App." are to the Appendix filed by the parties with the court below.

> waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances, subject to the right of appeal in accordance with the provisions of this Constitution, except where the member involved serves reasonable written notice on the United Transportation Union to the contrary.

And, in fact, the overwhelming bulk of the cases before the NRAB have continued to be submitted by union representatives of employees rather than by individual employees.[8]

Section 3 Second does not in terms contain an equivalent to § 3 First (j) or adopt that provision by reference. Rather, the 1966 amendment to § 3 Second provides that "the members" of a board created thereunder "shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board," and further provides for the establishment of such adjustment boards only upon request of (or by a carrier to) a union "representative." See p. 3, *supra*. And, the "different wording found in [§ 3 Second] is not accidental. By requiring a union to represent anyone seeking a special board, the 1966 amendment . . . sought to prevent frivolous claims from being tendered by individual employees to multitudinous special boards." *Antonioli* v. *Lehigh Coal and Navigation Company,* 47 F.R.D. 198, 201 (E.D. Pa., 1969). Hence, the "Congress did not pro-

[8] For example, of the 917 new cases filed with the NRAB in the fiscal year ended June 30, 1975, 865 were submitted by unions and only 52 by individual employees. Forty-first Annual Report of the National Mediation Board (1975), at 49-56.

vide for a Special Board where . . . the dispute is between an individual employee and a carrier" and "neither a carrier nor an individual employee can secure a Special Board where the employee's grievance is not being processed by a union," which "comports with the Congressional intent to avoid a proliferation of special boards where claims have not been previously screened by the union or railroad. S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 2." *Chicago, R. I. & P. R. Co.* v. *National Mediation Board,* 435 F.2d 339, 341, 342 (7th Cir., 1970).[9]

Hence, insofar as we are aware, public law boards and other special boards of adjustment established pursuant to § 3 Second heretofore have regarded the parties to disputes before such boards as being the unions and carriers involved, and have notified those parties of the hearings, as was done by Public Law Board No. 855 in this case.

[9] See, also, *Brotherhood of Locomotive Eng.*, v. *Denver & R.G.W. R. Co.*, 411 F.2d 1115, 1118 (10th Cir., 1969); *cf.*, *Slagley* v. *Illinois Central Railroad Company*, 397 F.2d 546, 551 (7th Cir., 1968). A union witness supporting the legislation testified that one reason for retaining the NRAB was to provide an arbitration forum for individual employees who chose to personally prosecute their claims. *Hearings on Railway Labor Act Amendments Relating to NRAB before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess., (1965), at 230. And, in the House debates, Representative Williams (the sponsor of the legislation) described in "some detail a hypothetical case of the type involved in this legislation" in terms which showed union handling at all stages (112 Cong. Rec. 2750-2751). He further stated that "one virtue of the special board procedure" is that "the carrier officers assigned to handle the board and the organization officer are more familiar with their own contract than if it were being handled by strangers to the contract" (*id.*, at 2751).

2. The Proceedings Below.

Mr. Cole was discharged in April of 1971 by the Erie Lackawanna for violating company rules. He had been a member of the UTU (or a predecessor union) since his employment by the railroad (App. 39), and he contacted local officials of that union about his grievance (App. 40-42). He was advised that the union would take the matter up with management and would handle it further to a board if necessary (App. 42). Mr. Cole was familiar (App. 47-48) with the provision in his union's constitution under which, unless notified by the employee to the contrary, the union is given "complete authority" to handle a member's claim or grievance, including "authority to receive notice of hearings" (see p. 7, *supra*). He did not notify the union to the contrary as "I thought that's what I was paying my union dues for, to have representation," and he knew that the union officials "were representing" him (App. 47).

The Erie Lackawanna and the UTU entered into an agreement pursuant to § 3 Second of the Act establishing Public Law Board No. 855 (comprised of a carrier member, a union member and a neutral member) to arbitrate certain claims submitted by the union which they had been unable to settle by agreement (App. 6-10), including the claim on behalf of Mr. Cole (App. 14, 20). Mr. Cole had talked with union officials many times about his claim throughout the period in which it was pending (App. 42-43), and he was advised by them about a week in advance of the date of the Board's hearing of the claim (App. 46). In his deposition taken after this litigation was commenced, Mr. Cole referred to that Board on occasion as the "Labor Relations Board" (App. 42, 45, 49), but he was aware it

would have three members (App. 46, 50)—"the union and the management and the judge" (App. 43).

Mr. Cole informed the union officials that he wanted to attend the hearing and bring witnesses, but was advised that his was the union's "best case" of the four to be heard at the time (App. 45, 46), that he needn't bring any witnesses, and that he couldn't attend as the hearing would be a closed session (App. 43-44, 45-46). There is no evidence that Mr. Cole advised Public Law Board No. 855, or any member thereof, that he wanted to attend the hearing or to bring witnesses, or that he took any action prior to the Board's award to obtain permission from the Board to do so apart from the aforesaid discussions with union officials. He provided the union officials with information and with the names of the witnesses he had in mind (App. 52), and there is no showing in the record that the union did not present any material evidence to the Board in written form (which is the usual procedure) or as to what additional evidence, if any, Mr. Cole and the putative witnesses would have presented to the Board if they had appeared at the hearing.

On June 1, 1972, Board No. 855 issued an award (App. 4-5), which found that Mr. Cole "without authorization of the Carrier, delegated his duty and responsibility for flag protection to a person not qualified to perform flag protection work and who was not an employee of the carrier," so that his dismissal was properly "based upon violation of rules as charged and was for just cause," and denied his claim for reinstatement with back pay. The award also recited, among other things, that the union and the carrier were the parties to the dispute and that said parties "were given due notice of hearing thereon."

Mr. Cole then instituted this litigation, through his own attorneys, to set aside that award (App. 3-4). The District Court granted his motion for summary judgment and set aside the award on the ground that the Board "failed to comply with the requirements" of § 3 First (j) of the Act in that it did not notify Mr. Cole personally of its hearing and thereby deprived him "of the right to appear either in person or through counsel as the statute permits." *Cole* v. *Railroad Adjustment Board,* 89 LRRM 2496, 2499 (N.D. Ohio, 1974).[10] The District Court remanded the case to Public Law Board No. 855 "for reconsideration upon due notice to petitioner," and directed that he "be given the opportunity to be heard through counsel and to present witnesses on his behalf." *Ibid.*[11]

On remand, the Board held a further hearing at which Mr. Cole appeared with counsel and testified (App. 34), and issued a new award (App. 32-36). The Board again found that Mr. Cole "was derelict in his duty when he was careless of the safety of other persons by delegating his responsibility as a flagman to a person who was not an employee or flagman of the Carrier" and also had violated a rule which "required

[10] The District Court also concluded that Cole "was not represented before the Board," apparently because it was under the impression that he was "no longer a member" of the UTU, and "could not understand how petitioner could have been represented by a union of which he no longer was a member" (89 LRRM, at 2499).

[11] Such an order has been held to be interlocutory in nature, and thus not immediately appealable. *Transportation-Com. Div.*. v. *St. Louis-San Francisco Ry Co.*, 419 F.2d 933 (8th Cir., 1969), cert. den., 400 U.S. 818 (1970). Review on appeal is had, as in this case, after a final decision is entered by the district court following the proceedings of the arbitration board on remand.

him to have with him appropriate torpedoes," so that the Erie Lackawanna "had just cause to discipline" him (App. 35). But without further explanation, the Board also concluded that a "discharge was too harsh and severe under the circumstances," and that it should be "converted to a disciplinary lay-off of 365 calendar days" (*ibid.*). That period had long since expired, and the Board ordered that Mr. Cole "be restored to duty with full vacation rights, full seniority and all privileges to which he is entitled;" and that he be awarded back pay for all time lost between the end of the disciplinary period and his reinstatement without "deduction for outside earnings" during that period (*ibid.*).

An Amended Petition in this litigation by Mr. Cole to enforce the Board's second award was granted by the District Court. *Cole* v. *Erie Lackawanna Railway,* 396 F. Supp. 65 (N.D. Ohio, 1975), and the Erie Lackawanna's appeal after that final order led to the decision by the Sixth Circuit which is the subject of the petition for writ of certiorari. *Cole* v. *Erie Lackawanna Railway Company,* 541 F.2d 528 (6th Cir., 1976). In affirming the decisions of the District Court, the court below held, among other things, that "the notice requirements" of § 3 First (j) are applicable to adjustment boards established pursuant to § 3 Second of the Act as well as to the NRAB (*id.,* at 532-533); that under § 3 First (j) an employee must be given "[a]ctual notice . . . of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim" (*id.,* at 534) even though, as occurred in this case, the employee "authorized" the

union "to handle his grievance" and in fact was "represented" by the union (*id.*, at 534-535); and that, while Mr. Cole "knew in advance that the Board would be conducting a hearing on his claim," he "did not understand the workings of the Board" as is demonstrated by "his reference to the Board as the 'Labor Relations Board' and his requests to be present and present witnesses" (*id.*, at 535).

From this and a conclusion that the "union [which is not a party to the litigation] cannot contend that Appellee's right to effective presentation of his claim to the Board, as guaranteed by Section [3 First (j)] has been preserved when he was prevented from conveying potentially helpful information to the Board via union officials," the majority of the Court of Appeals concluded that Mr. Cole "did not receive notice sufficient to obviate the provision to him of formal notice as required by" § 3 First (j) (*ibid.*). Judge Engel dissented (*id.*, at 536-537).

3. The Interest of Amicus Curiae.

The National Railway Labor Conference represents almost all of the nation's Class I railroads in national collective bargaining with the unions representing their employees, and in regard to other labor-management relations problems that are of concern to the railroads generally. The decision below is a matter of great concern to the Conference and to its member railroads because, if not reviewed and reversed by this Court, it threatens to upset the heretofore settled accommodation of this Court's *Burley* decision; to extend § 3 First (j) of the Act and that decision (however construed) to the proceedings of public law boards and other special boards of adjustment established

pursuant to § 3 Second; and to undermine the finality of arbitration awards by allowing an employee to obtain a judgment setting aside such an award and to obtain a second opportunity for a favorable award without any fault on the part of the adjustment board or the carrier involved and by reason solely of some lack of understanding on the part of the employee attributable solely to the actions or advice of the union which he authorized to represent him.

If the decision below should stand, the carriers will be unable to rely with confidence upon either an agreement with a union settling a claim or grievance submitted by the union on behalf of an employee, or upon an award by the NRAB or a § 3 Second adjustment board disposing of the dispute, even though the union concededly has been authorized to represent the employee. There always would be the possibility that such settlement agreement or award could be upset because the employee, unbeknownst to the carrier or the adjustment board, had been advised by union officials in a manner subsequently deemed by a court to be inadequate or improper. In our view, this would seriously undermine the procedures which the Congress in the Railway Labor Act has provided for the disposition of claims and grievances.

REASONS FOR GRANTING THE WRIT

We believe that it is apparent from the foregoing recital that the decision below not only conflicts with the decision of this Court in the *Burley* case and is otherwise erroneous, but also reaches a result that has large importance to the proper working of the Railway Labor Act in the handling and disposition of disputes over grievances and the application and inter-

pretation of collective bargaining agreements. And, as we shall show, the decision below also constitutes an impermissible evasion of the limitations which this Court has placed upon a union's duty of fair representation.

A violation of § 3 First (j) of the Act is essential to the validity of the decision setting aside the first award by Public Law Board No. 855, since the Act expressly permits that to be done only if an adjustment board fails to "comply with the requirements of" the Act, or to confine itself to "matters within the scope of" the board's "jurisdiction," or "for fraud or corruption by a member" of the board. See pp. 3-4, *supra*. There is no claim or holding in this case that Board No. 855 exceeded its jurisdiction or of fraud or corruption on the part of a member, and the only claim or holding in regard to the "requirements of the Act" is based upon the alleged failure to comply with § 3 First (j).

We believe that the holding below that § 3 First (j) is applicable to public law boards and other special boards of adjustment established pursuant to § 3 Second of the Act is highly questionable, to say the least, and in itself is an issue worthy of review by this Court. As we have indicated, that holding is contrary to the language of § 3 Second and of the legislative history of the 1966 amendment thereto, and to principles expressed by other lower courts. See pp. 8-9, *supra*. But however that may be, § 3 First (j) surely has been complied with in this case.

Section 3 First (j) provides that the NRAB "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dis-

putes submitted to" the Board. But there is nothing in § 3 First (j) which say that notice to an "employee or employees" cannot be effectuated through notice to his or their authorized representative in the adjustment board proceedings, just as notice to or service upon a party to a law suit commonly is effectuated through notice to or service upon his attorney. Indeed, the general common-law rule is that notice to an agent constitutes notice to his principal regardless of whether the agent communicates it to the principal.[12]

In any event, while this Court held in *Burley* that the Railway Labor Act does not in itself authorize the collective bargaining agent of a craft or class of employees to represent them in NRAB proceedings, so that "for the union to act in their behalf with conclusive effect, authorization by them over and above any authority given by the statute was essential" (see p. 5, *supra*), this Court also made clear that such authority could be given to the union in a variety of ways (see pp. 5-6, *supra*). As this Court subsequently stated (citing and quoting from *Burley*), the "individual employee's rights" under § 3 First (j) "to participate in the processing of his grievances 'are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf.' " *Czosek* v. *O'Mara,* 397 U.S. 25, 28 n. 1 (1970).

Moreover, this Court also explained in *Burley,* both initially and in its opinion on rehearing, that one of the ways in which an employee could authorize his union to act in his behalf was through his membership when the union's constitution or by-laws provided for

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[12] See *e.g.*, Restatement Agency 2d, § 268; 3 Am. Jur. 2d, Agency § 273; 3 C.J.S., Agency, § 432.

such representation (see pp. 5-6, *supra.*). See also, *e.g., Simberlund* v. *Long Island Rail Road Company,* 421 F.2d 1219, 1225 (2d Cir., 1970), holding that such a provision in a union's constitution "was sufficient to vest authority in the" union to "act in . . . behalf" of a member in handling and settling his claim or grievance. And, as we have noted (pp. 7-8, *supra.*), the union generally have adopted such provisions in reaction to and accomodation of the *Burley* decision.

Thus, in this case, the constitution of Mr. Cole's union—the UTU—contained a provision giving it "complete authority" to handle his claims and grievances, specifically including "authority to receive notice of hearings" and to "appear for, represent, and act for" him "before any person, board, or other tribunal in connection" therewith. See pp. 7-8, *supra.* While Mr. Cole could have revoked that authorization by notice to the union, as he knew, he did not do so because he wanted representation by the union "as that's what I was paying my union dues for. . . ." See p. 10, *supra.*

But for the decision below, therefore, it would seem entirely clear that when Public Law Board No 855 notified the UTU of its hearing on the claim submitted by the UTU on behalf of Mr. Cole, the Board in effect gave such notice to Mr. Cole. There is no requirement in § 3 First (j) or elsewhere in the Act, or in reason, imposing upon an *adjustment board* an obligation to assure "actual" notice to a claimant whose authorized representative formally has been notified.[13] If there

[13] The court below relied upon three decisions by the Seventh Circuit for its view that actual notice to the employee claimant also is required. See 541 F.2d, at 534. One of those cases, the *Hunter* case, held to the contrary that § 3 First (j) would be satisfied if the employees involved either had "actual notice of the hearings, *or* authorized the Santa Fe" (which was formally notified and which purported to represent their interests) to represent them in such proceedings. 188 F.2d, at 301 (emphasis added). The *Whitehouse* case involved a situation in which one union on behalf of member employees claimed the right to perform work being performed by members of a second union. This Court subsequently held that the conflicting claims of the two unions on behalf of their members should be resolved in one adjustment board proceedings by giving notice pursuant to § 3 First (j) to the second union, without in any way suggesting that either formal or actual notice also had to be given to the interested members of that union. *Transportation Union* v. *U.P.R. Co.,* 385 U.S. 157 (1966). And, in the *Kotakis* case, the Seventh Circuit held that notice to the employee's union was sufficient to comply with § 3 First (j) since the employee had authorized the union to represent him and knew that it was representing him in a NRAB proceeding, 520 F.2d, at 576. In so holding that Court rejected a contention that the board also was required to notify the employee personally of its hearings (*ibid.*), which holding also is contrary to the decision below in this case.

is any obligation to afford "actual" notice in those circumstances. it is the obligation of the union or other authorized agent to its principle. But under § 3 First (p) and (q) of the Act, an adjustment board's award can be set aside for "failure of the division [*i.e.,* of the board] to comply with the requirements of this Act," not for some failure of a union or other authorized representative.

An employee's actual notice or knowledge may be important if he has not authorized a union to represent him, and has not himself been given formal notice of the hearings. As this Court pointed out in *Burley* on rehearing, an employee cannot stand by with notice or knowledge that the union is purporting to represent him and then, after an adverse decision, "come in for the first time to assert his individual rights." See p. 6, *supra.* See also, *e.g., National Air., Inc.* v. *International Ass'n of Mach., Etc,* 478 F.2d 1062, 1066 (5th

Cir., 1973); *Pyzynski* v. *New York Central Railroad Company,* 421 F.2d 854, 861 (2d Cir., 1970). Hence, even if Mr. Cole had not authorized the UTU to represent him, this action to set aside the award should have been denied because he stood by until after an adverse award was rendered by Public Law Board No. 855 without ever attempting to assert his individual rights to the Board and with knowledge that the UTU was proceeding with his claim before the Board, including a week's advance notice from the union of the date of the hearings. See pp. 10-11, *supra.*

We doubt if Mr. Cole was so lacking in understanding of "the workings of the Board" as the court below believed. His reference at a later date to the Board as a "Labor Relations Board" hardly is a heinous mistake, and Mr. Cole was aware of the composition of the Board. See pp. 10-11, *supra.* In any event he understandably relied on his union to represent him "as that is what I was paying my union dues for," and there is no contention that the union did not understand "the workings of the Board." So, too, the court below did not hold that the union was mistaken in informing Mr. Cole that the Board's meeting would be closed so that he could not attend and that there was no need for his witnesses. And, the record does not support the assertion of the court below that Mr. Cole "was not allowed to convey information which might have been helpful to his claim" as he conveyed information and gave the names of his putative witnesses to his union representative. See p. 11, *supra.*

In any event, the foregoing discussion points up the fact that if any mistakes or wrongdoing occurred in connection with the arbitration proceeding, it was on the part of Mr. Cole's union as his representative.

While that is not grounds for setting aside an arbitration award under § 3 First (p) and (q), it may be grounds for a suit based upon an alleged violation of the duty of fair representation. That duty extends to a union's representation of employees in the handling of their claims and grievances. *Conley* v. *Gibson,* 355 U.S. 41, 46-47 (1957); *Glover* v. *St. Louis-S.F. R. Co.,* 393 U.S. 324 (1969). However, this Court has imposed strict limits upon the duty of fair representation so as to avoid undue restrictions upon a union's freedom to represent its members in the manner it deems appropriate under the circumstances.

In general, therefore, to establish a violation of the duty of fair representation, an employee "must have proved 'arbitrary or bad-faith conduct on the part of the Union.' *Vaca* v. *Sipes,* [386 U.S. 171], at 193 [1967]. There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' *Humphrey* v. *Moore,* [375 U.S. 335], at 348 [1964]." *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 299 (1971). More particularly for present purposes, a union's refusal even to submit a grievance to arbitration cannot constitute a breach of the duty of fair representation, in the absence of "proved arbitrary or bad faith conduct on the part of the Union in processing [the] grievance," since "the union's incentive to settle such grievances short of arbitration would be seriously reduced" if a breach of the duty of fair representation could result merely "because a judge or jury later found the grievance meritorious . . . ." *Vaca* v *Sipes, supra,* at 192-193. So, too, "[j]ust as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous dis-

putes," and the fact that the union gave advice or assurances to an employee as to the handling of his grievance that "were not well founded" did not violate the duty if there was "insufficient proof of dishonesty or intentional misleading on the part of the union." *Humphrey* v. *Moore, supra,* at 348-349.

There is no showing or even a clear holding by the court below that the UTU was negligent or mistaken in its handling of Mr Cole's grievance, much less that it acted dishonestly or in bad faith. But even if the UTU "may have acted negligently or exercised poor judgment," that "is not enough to support a claim of unfair representation." *Bazarte* v. *United Transportation Union,* 429 F.2d 868, 872 (3d Cir., 1970). Moreover, even where a union has violated that duty, there is no "possible sense . . . in a rule which would permit a court . . . to fashion a remedy only with respect to the employer," as that would be "slight deterrence, indeed, to future union misconduct . . . ." *Vaca* v. *Sipes, supra,* at 187. Yet, the court below has affirmed a decision which penalizes only the employer by setting aside an arbitration award in its favor and allowing the employee a second opportunity in circumstances where there was no fault of any kind on the part of either the adjustment board or the employer, and any fault of the union would not be sufficient to prove a breach of its duty of fair representation.

Indeed, only last Term, this Court emphasized the protections afforded by the limitations imposed upon the duty of fair representation, to the finality of arbitration awards, in holding that an employee could recover from his employer for breach of contract in discharging the employee without good cause (if proven), despite an arbitration award in favor of the employer,

where that award was tainted by the bad faith of the employee's union in handling his grievance. *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976) In rejecting a contention that its holding would "undermine not only the finality rule but the entire collective-bargaining process" (*id.,* at 570), this Court explained that:

> ". . . [T]he burden on employees will remain a substantial one, far too heavy in the opinion of some. To prevail against either the company or the Union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union. As the District Court indicated, this involves more than demonstrating mere errors in judgment. . . . The grievance process cannot be expected to be error free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event error and injustice of the grossest sort would multiply."

Id., at 570-571.

The decision below in this case effectively strips an employer under the Railway Labor Act of the protections afforded under the duty of fair representation by the requirement of proof that "the employee's representation by the union has been dishonest, in bad faith or discriminatory. . . ." Without those protections, upon which this Court relied in *Hines* for its contrary conclusion, the decision below will indeed "undermine not only the finality rule, but the entire collective-bargaining process" unless reviewed and cor-

rected by this Court. It will be possible for a court to set aside an award by an adjustment board, despite the severe limitations imposed by the Congress upon the scope of juicial review, for what are at most "mere errors in judgment" or "occasional instances of mistake" on the part of an employee's authorized union representative. We submit that the law is and should be to the contrary. But however that may be, surely the decision below is sufficiently questionable and important to justify review by this Court.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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